



September 19, 2000

Ms. Janice Marie Wilson
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78768

OR2000-3605

Dear Ms. Wilson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 138652.

The Texas Department of Transportation (the "department") received a request for any and all personnel, employment, payroll, time sheets, and other personnel records pertaining to a named department employee. You state that most of the requested information is contained in the employee's personnel file and will be released. However, you claim information contained in the employee's medical file is excepted from disclosure under section 552.101 of the Government Code in conjunction with various federal statutes. We have considered the exception you claim and reviewed the submitted information, Exhibits B-E.

First, we note that the department claims that Exhibits B, C, and D must be withheld under section 552.101 in conjunction with the Family Medical Leave Act (the "FMLA"). Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses confidentiality provisions such as the FMLA. We also note that section 825.600 of chapter V of volume 29 of the Code of Federal Regulations provides that

(g) [r]ecords and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members, created for the purposes of the FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements...

29 CFR § 825.600(g). The department also claims that Exhibits B, C, and D are confidential under the American with Disabilities Act of 1990 (the "ADA"). Because the FMLA defers to the confidentiality provisions of the ADA when the ADA is applicable, we will address whether the submitted documents are confidential under the ADA.

The ADA provides for the confidentiality of certain medical records of employees and applicants. Specifically the ADA provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. In addition, information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c). *See also* Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission (the "EEOC") determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as, general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997).

You state that submitted Exhibits B, C, and D are contained in a separate medical file. You state this separate medical file was created and maintained on separate forms and was treated as confidential pursuant to section 12112(d) of chapter 42 of the United States Code. You state that there appears to be no provision permitting the release of confidential information with the consent of the employee or after the employee's death. After reviewing your arguments and the submitted documents, we find that Exhibits B, C, and D are confidential under section 552.101 in conjunction with the ADA. The exceptions to section 12112(d) are not applicable in this instance. Therefore, the department must withhold Exhibits B, C, and D in their entirety.

Next, you state that Exhibit E contains generic documents and previously redacted forms that were included in the named employee's medical file to serve as models for the forms to be used in creating the file at issue. After reviewing Exhibit E, we agree that these documents are not confidential under the federal statutes at issue here. Thus, the department must release Exhibit E to the requestor.

In conclusion, the department must withhold Exhibits B-D in their entirety under section 552.101 in conjunction with the ADA. The department must release Exhibit E.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the

full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

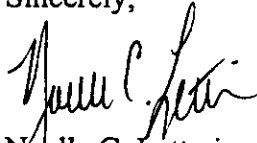
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Noelle C. Letteri
Assistant Attorney General
Open Records Division

NCL/pr

Ref: ID# 138652

Encl. Submitted documents

cc: Ms. Carolyn Johnson
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(w/o enclosures)